

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **08-08404-hb**

Adversary Proceeding Number: **11-80086-hb**

**ORDER AND JUDGMENT DENYING RELIEF REQUESTED IN ADVERSARY
PROCEEDING AND MOTION FOR DEFAULT JUDGMENT**

The relief set forth on the following pages, for a total of 6 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
09/02/2011**



Entered: 09/06/2011

US Bankruptcy Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re,

Timothy Carl Kain and Ruth Mulfinger Kain,

Debtor(s).

Timothy Carl Kain
Ruth Mulfinger Kain,

Plaintiff(s),

v.

Beneficial South Carolina, Inc.
Beneficial Mortgage Co. of South Carolina
Beneficial Financial I Inc,

Defendant(s).

C/A No. 08-08404-HB

Adv. Pro. No. 11-80086-HB

Chapter 13

**ORDER AND JUDGMENT DENYING
RELIEF REQUESTED IN
ADVERSARY PROCEEDING AND
MOTION FOR DEFAULT
JUDGMENT**

THIS MATTER came before the Court upon Motion for Default Judgment¹ filed by Plaintiffs Timothy Carl Kain and Ruth Mulfinger Kain (“Debtors”). A hearing was held on September 1, 2011. John R. Cantrell, Jr., appeared on behalf of the Debtors. Defendants did not make an appearance after due notice. Upon consideration of the facts surrounding this adversary proceeding and the Court’s records, the Court finds that the relief requested cannot be granted.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and Local Civil Rule 83.XI.01, DSC. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A) and (C) and venue is proper in this district pursuant to 28

¹ Doc. No. 4, filed on August 9, 2011.

U.S.C. §§ 1408 and 1409. The following facts are gleaned from the Court's docket and record for the Debtors' case.²

Debtors filed a voluntary petition for relief under Chapter 13³ on December 30, 2008. Debtors' bankruptcy schedules, filed on the same day, disclose ownership of Debtors' residence, located at 5 Starsdale Circle, Greenville, South Carolina, valued therein at \$101,000.00.

Debtors' schedules list a claim in the amount of \$166,220.66 to Countrywide Home Loans on their Schedule F resulting from a "Rescinded Home Loan" related to the property. The Debtors scheduled that claim as disputed (hereinafter referred to as the "disputed first mortgage").

Debtors' schedules also list Defendant as the holder of a mortgage claim secured by the property, marking the claim as disputed. Defendants filed proof of claim 2-1 in Debtors' case for \$18,472.77 on January 7, 2009, designating as secured by a mortgage.

The Chapter 13 plan proposed by the Debtors was confirmed on February 4, 2010.⁴ Pursuant to the terms of the confirmed plan⁵, Defendants' mortgage claim is treated as a secured claim, with loan arrearages paid through the Chapter 13 plan and the remainder of the claim to be paid directly by the Debtors outside the plan with regular payments resuming in January of 2009. The plan stated that "Debtors reserve the right to dispute this loan in the event that this creditor is not the legal owner and holder of the Note and Mortgage." However, no such challenge has been made through this Court.⁶

² C/A No. 08-08404-HB and related Adv. Pro. No. 11-80086-HB and Adv. Pro. No. 10-80047-HB.

³ *In re Kain*, C/A No. 08-08404-HB (Bankr. D.S.C. Dec. 30 2008).

⁴ Doc. No. 49, C/A No. 08-08404-HB.

⁵ Doc. No. 40, C/A No. 08-08404-HB.

⁶ The delay in confirmation was substantially due to Debtors' dispute of the first mortgage.

Debtors' confirmed plan also stated that the Debtors would challenge the disputed first mortgage in an adversary proceeding. The plan states that "Although Countrywide Home Loans claims to be secured, this loan has been rescinded pursuant to TILA and Debtors propose to treat the claim in the plan as unsecured. Countrywide disputes Debtors' treatment of the claim as unsecured; however, in order to allow this plan to be confirmed, so that disbursements to other creditors can begin, both Countrywide and the Debtors agree that the trustee should not disburse on the Countrywide claim at this time, and that all rights as to all issues between the Debtors and Countrywide shall be reserved in spite of the confirmation of this plan, until further order of the Court regarding this claim."

On April 7, 2010, Debtors filed Adversary Proceeding 10-80047-HB, challenging the disputed first mortgage claim. That matter is pending with discovery ongoing⁷ and no final decision has been rendered. In that proceeding, Debtors seek to eliminate the disputed first mortgage.⁸

On July 1, 2011, Debtors filed this adversary asking the Court to find pursuant to 11 U.S.C. § 506(d)⁹ that: (1) Defendant has no secured interest in the property in question; (2) the Court should order that Defendant, upon entry of a discharge order, must cancel the mortgage; (3) that the Court direct the Chapter 13 trustee to treat Defendant's claim as unsecured under the plan; and (4) for reasonable attorneys' fees. The factual allegations of

⁷ On the same day that this hearing was held, the Court heard Debtors/Plaintiffs' Motion to Compel discovery in Adv. Pro. No. 10-80047-HB.

⁸ *Kain v. Bankr of New York Mellon, et. al.*, Adv. Pro. No. 10-80047-HB (Bankr. D.S.C. April 7, 2010).

⁹ This provision provides that;

To the extent that a lien secures a claim against the debtor that is not an allowed secured claim, such lien is void, unless—

(1) such claim was disallowed only under section 502(b)(5) or 502(e) of this title; or
(2) such claim is not an allowed secured claim due only to the failure of any entity to file a proof of such claim under section 501 of this title.

11 U.S.C. § 506(d). A request to declare a lien as void is normally presented to the Court as part of the debtors' plan. See SC LBR 3015-1, Ex. A at 2 (stating under Section C that "[t]he debtor moves, in accordance with 11 U.S.C. § 506, to establish the value of the lien as follows . . .")

the complaint allege that as a result of the \$182,232.36 disputed first mortgage, and after considering the scheduled value of the property at \$101,000.00, there is no equity in the real property to secure Defendant's debt.

On August 9, 2011, the Clerk of Court recorded an entry of default against Defendants in this action on the Court's docket¹⁰, as Defendants failed to respond to the Summons and Complaint. Defendants then asked the Court to enter a judgment by default granting the requested relief. Upon review of the request, and after comparing the factual allegations of the complaint and the record in this case to the requested relief, the Court scheduled a hearing to consider the matter. After that hearing, further review of the docket and pleadings and after considering the arguments of counsel for the Debtors, the Court finds that the relief requested by Plaintiff in this matter is inappropriate.

The court is required to exercise sound judicial discretion in determining whether a default judgment should be entered. *See* Fed. R. Civ. P. 55(b)(2) (requiring the request for default judgment be presented to the court for entry of judgment). "This element of discretion makes it clear that the party making the request is not entitled to a default judgment as of right, even when defendant is technically in default and that fact has been noted under Rule 55(a)." 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2685 (3d ed. 1998) (footnotes omitted). "In determining whether to enter a default judgment, the court is free to consider a number of factors that may appear from the record before it." *Id.* (footnotes omitted).

The requested relief is not supported by the facts known to the Court and asserted by Debtors in this and other proceedings before this Court. Debtors' confirmed plan—proposed by Debtors and confirmed upon their request with a requirement that both the plan

¹⁰ Doc. No. 5.

be proposed in good faith and the case be filed in good faith—treat Defendant’s claim as secured and *require* Debtors to make regularly payments directly to Defendant outside the plan.¹¹ Further, Debtors are actively and aggressively challenging the disputed first mortgage in another proceeding pending in this Court, yet in this matter that disputed first mortgage must endure to justify the relief requested in this adversary and Motion.

Although the clerk’s entry of default may stand to indicate that Defendants did not appear in this matter, the Court finds that the relief requested in the Motion for Default Judgment is inappropriate at this time and all relief requested is therefore **DENIED**.

AND IT IS SO ORDERED.

¹¹ If Debtors are not maintaining these payments as proposed, they are in default under the terms of their own plan.